



July 23, 2001

Ms. Jan Clark
Assistant City Attorney
City of Houston - Legal Department
P.O. Box 1562
Houston, Texas 77251-1562

OR2001-3195

Dear Ms. Jan Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149716.

The City of Houston (the "city") received a request for a copy of various personnel records for a specified city jailor. You state that you will release to the requestor most of the responsive information. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public, unless it is confidential under other law. One category of expressly public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). The submitted information contains five completed investigations undertaken by the city police department's Internal Affairs Division. Therefore, these investigations must be released to the requestor, unless they are confidential under other law or excepted from disclosure pursuant to section 552.108 of the Government Code.

You claim that the Internal Affairs Division investigations in Exhibits 12 and 13 are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.¹ Section 143.089 contemplates two different types of personnel files, one that the police department is required to maintain as part of the police officer's civil service file, and one that the police department may maintain for its own internal use. *See* Local Gov't Code § 143.089(a), (g).

¹ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes.

The civil service file must contain certain specified items, including documents relating to any misconduct in those cases where the police department took disciplinary action against the peace officer. *See id.* § 143.089(a)(2). However, documents relating to any alleged misconduct or disciplinary action taken must be removed from the civil service file if the police department determines that there is insufficient evidence to sustain the charge of misconduct or that the disciplinary action was taken without just cause. *See id.* § 143.089(b), (c). Thus, subsections (a)-(c) limit the contents of the civil service file.

Subsection (g) authorizes, but does not require, the city police department to maintain for its use a separate and independent, internal personnel file on a peace officer. Section 143.089(g) provides:

A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Local Gov't Code § 143.089(g). In *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946 (Tex. App.--Austin 1993, writ denied), the court addressed a request for information contained in a police officer's personnel file maintained by the city police department for its use and addressed the applicability of section 143.089(g) to that file. The records included in the personnel file related to complaints against the police officer for which no disciplinary action was taken. The court determined that section 143.089(g) made these records confidential. *See City of San Antonio*, 851 S.W.2d at 949. You state that the investigations in Exhibits 12 and 13 may only be held by the city's police department in a departmental file and that no disciplinary action was taken against any officer referenced in the investigations. You also state that the portions of the investigations regarding the specified jailer are inextricably interwoven and co-mingled with the allegations regarding the classified police officers. We, therefore, agree that Exhibits 12 and 13 are confidential and must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

You claim that the Internal Affairs Division investigations in Exhibits 9, 10, and 11 are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(a)(2) provides that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from disclosure "if it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication." Gov't Code § 552.108(a)(2). Generally, a governmental body claiming section 552.108(a)(2) as an exception to disclosure of requested information must demonstrate that the information relates to a criminal

investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state that the incidents referenced in these investigations were investigated as criminal offenses. You also state that these investigations did not result in any filed charges or in conviction or deferred adjudication. Therefore, we understand that these investigations concluded in a final result other than conviction or deferred adjudication. Accordingly, we agree that the investigations in Exhibits 9, 10, and 11 may be withheld from disclosure pursuant to section 552.108(a)(2) of the Government Code. We note, however, that section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, you must release basic information in Exhibits 9, 10, and 11 pursuant to *Houston Chronicle*. *See* Open Records Decision No. 127 (1976) (summarizing the types of basic information that must be made available to the public).

You also claim that the city police department's Standard Operating Procedures document in Exhibit 8 concerning the search of prisoners is excepted from disclosure pursuant to section 552.108. Section 552.108(b)(1) provides that an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from disclosure if "release of the internal record or notation would interfere with law enforcement or prosecution." Gov't Code § 552.108(b)(1). This office has stated that under the statutory predecessor to section 552.108(b), a governmental body may withhold information that would reveal law enforcement techniques. *See* Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release of forms containing information regarding location of off-duty police officers in advance would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). However, a governmental body claiming section 552.108(b)(1) as an exception to disclosure of requested information must demonstrate how and why release of the information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the release of the Standard Operating Procedures document in Exhibit 8 would give individuals the information they need to hide weapons, contraband, or evidence in jail. You also state that this could lead to jailers, as well as other prisoners, being injured and the loss of evidence. Therefore, we conclude that the release of this information would interfere with law enforcement. *See* Gov't Code § 552.108(b)(1). Accordingly, the Standard Operating Procedures document in Exhibit 8 may be withheld from disclosure pursuant to section 552.108(b)(1) of the Government Code.

You claim that the submitted information in Exhibits 5, 6, and 7 is excepted from disclosure pursuant to section 552.101 in conjunction with the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). We agree that most of the information in Exhibits 5, 6, and 7 constitutes medical records that may only be released in accordance with the access provisions of the MPA. *See* Occ. Code §§ 159.002(c), 159.004, 159.005; *see also* Open Records Decision No. 598 (1991) (in governing access to specific subset of information, Medical Practice Act governs over more general provisions of the Public Information Act). We have marked these medical records for your review.

You claim that the submitted information in Exhibits 2 and 3 is criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Furthermore, where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We, therefore, conclude that you must withhold from disclosure any CHRI that may exist in Exhibits 2 and 3. *See id.*; *see also* Gov't Code § 411.106(b), .082(2) (defining criminal history record information).

We note that Exhibit 3 contains social security numbers. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, you should ensure that the numbers were not obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

We also note that Exhibit 3 contains information excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. You must withhold from disclosure the marked drivers' license and license plate number information in Exhibit 3 pursuant to section 552.130 of the Government Code. If the unmarked motor vehicle information in Exhibit 3 relates to a license, permit, title, or registration issued by an agency of the state of Texas, you must also withhold it from disclosure pursuant to section 552.130.

Finally, you claim that the submitted grand jury subpoenas in Exhibit 4 are excepted from disclosure pursuant to section 552.101 in conjunction with Article 20.02 of the Code of Criminal Procedure. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." This office has concluded that grand juries are not governmental bodies that are subject to the Act, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). Information obtained pursuant to a grand jury subpoena issued in connection with an investigation is within the grand jury's constructive possession. *See id.* at 3. It does not appear, and you do not argue, that the submitted subpoenas are in the actual or constructive possession of a grand jury. Accordingly, we conclude that you may not withhold the submitted grand jury subpoenas from disclosure pursuant to section 552.101 in conjunction with article 20.02 of the Code of Criminal Procedure.

In summary, you must withhold Exhibits 12 and 13 from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. You may withhold Exhibits 8, 9, 10, and 11 from disclosure pursuant to section 552.108 of the Government Code. You may release the medical records that we have marked in Exhibits 5, 6, and 7 only in accordance with the access provisions of the MPA. You must withhold any CHRI that may exist in Exhibits 2 and 3 from disclosure. You must withhold from disclosure the marked drivers' license and license plate number information in Exhibit 3 pursuant to section 552.130 of the Government Code. If the unmarked motor vehicle information in Exhibit 3 relates to a license, permit, title, or registration issued by an agency of the state of Texas, you must also withhold it from disclosure pursuant to section 552.130. You must release all other information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 149716

Enc: Marked documents

c: Ms. Cynthia Henley
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(w/o enclosures)